STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Sawyer, P.J., Saad and Meter, JJ.

HAROLD HUNTER, JR.,

Plaintiff-Appellant,

Supreme Court Docket No. 147335

-v-

Court of Appeals Docket No. 306018

DAVID SISCO and
AUTO CLUB INSURANCE ASSOCIATION,

Defendants,

and

CITY OF FLINT
Defendant-Appellee.

_____/

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT OF THE BASIS OF JURISDICITION OF THE SUPREME COURT

The City agrees with the basic facts set forth in the first paragraph of Appellant's Statement of Jurisdiction. This Court has jurisdiction over this matter as set forth. However, the City disagrees with the remainder of Appellant's Statement as both incorrect and irrelevant. This Court limited its review to the issue of whether damages for pain and suffering qualify as a bodily injury.[1] As a result, the remaining two and a half pages of Appellant's Statement which purports to disagree with the Court of Appeals review of the No Fault threshold issue is irrelevant. This Court did not grant leave as to the Court of Appeals' decision as to the threshold No Fault issue; hence, it is irrelevant.

Further, the City disagrees with Appellant's assertion that the City did not have an appeal of right to the Court of Appeals. The City filed a Summary Disposition Motion based on governmental immunity in the Trial Court. The Trial Court denied the City's motion. Hence, the City clearly had an appeal of right.

MCR 7.203 states in relevant parts as follows.

Jurisdiction of the Court of Appeals.

[1] See, *Hunter v. Sisco,* 843 NW2d 559. On order of the Court, the motion for reconsideration of this Court's November 20, 2013 order is considered, and it is GRANTED. We VACATE that part of our November 20, 2013 order that denied the plaintiff's application for leave to appeal. On reconsideration, the application for leave to appeal the April 2, 2013 judgment of the Court of Appeals is considered, and it is GRANTED, *limited to whether damages for pain and suffering and/or emotional distress may qualify as a "bodily injury"* that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405 (see *Wesche v Mecosta Co Rd Comm*, 480 Mich 75; 746 NW2d 847 (2008)). (emphasis added).

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
(1) A *final judgment*

An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.

MCR 7.202(6)(a)(v) defines "final order" as follows:

(6) "final judgment" or "final order" means

(a) In a civil case,
(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. DO PAIN AND SUFFERING AND/OR EMOTIONAL DISTRESS DAMAGES QUALIFY AS A "BODILY INJURY" THAT PERMITS A PLAINTIFF TO AVOID THE APPLICATION OF GOVERNMENTAL IMMUNITY FROM TORT LIABILITY UNDER THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY?

Plaintiff-Appellant answers: Yes
Defendant-Appellee answers: No
The Trial Court Answered: Yes
The Court of Appeals Answered: No

COUNTER STATEMENT OF FACTS

The City objects to Appellant's Statement of Facts to the extent that it violates MCR 7.212(C)(6) in that it interjects argument and bias into the Statement. Although the entire Statement is written in this way, the City will not belabor this point given that Appellant's attempt at argument within the Statement will have no bearing upon the Court's decision in this matter given that the relevant facts are not in dispute. Therefore, the City otherwise accepts and adopts Appellant's Statement of Facts pursuant to MCR 7.306(A).

APPLICABLE LAW

A. Governmental Tort Liability Act

The Governmental Tort Liability Act ("GTLA"), MCL 691.1401, *et seq.*, abolishes tort liability for governmental agencies engaging in the exercise or discharge of governmental functions with six enumerated exceptions. "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function". MCL 691.1407 and *Robinson v City of Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000). The exception to this broad grant of immunity disputed in the instant case arises from MCL 691.1405, commonly referred to as the "motor vehicle exception", which states as follows:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is the owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.41 to 257.923 of the Compiled Laws of 1948.

This Court has long recognized that exceptions to the GTLA must be narrowly construed. *Nawrocki v Macomb Cnty. Rd. Comm'n*, 463 Mich. 143, 158; 615 NW2d 702 (2000). Further, this Court has explicitly noted that such interpretation requires strict definitions of terms therein. *Stanton v City of Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002). This Court has recognized that this strict reading of the GTLA is necessary to prevent a drain on governmental agencies' resources. *Mack v City of Detroit*, 467 Mich 186, 202-03 n.18; 649 NW 2d 47 (2002).

Specifically at issue in this case is the definition of "bodily injury" as set forth within the motor vehicle exception. This Court has recognized that the interpretation of legislation should be

based upon the common and ordinary meaning of words. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). If the legislation is unambiguous, it should be presumed that the plain meaning is intended, and further construction by a court is not permitted. *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 219; 731 NW2d 41 (2007). This Court has further determined that "bodily injury" as set forth within MCL 697.1405 is one such unambiguous term. *Wesche v Mecosta County Road Comm.*, 480 Mich 75, 84; 746 NW2d 847 (2008). In so ruling, this Court stated that "bodily injury" means "a physical or corporeal injury to the body", and further found that because the loss of consortium claim at issue was "a nonphysical injury, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity." *Id.* at 85. The Court further opined that the motor-vehicle exception does not "state or suggest that governmental agencies are liable for *any* damages once a plaintiff makes a threshold showing of bodily injury..." *Id.* at 86 (emphasis in original). This Court has consistently made this distinction between physical injuries (and their attendant medical expenses) and pain and suffering, and has simply acknowledged "medical expenses and pain and suffering are distinct categories of damages." *Kelly v Builders Square, Inc.*, 465 Mich 29, 39; 632 NW2d 912 (2001).

B. The No-Fault Act

Appellant asserts damages beyond the scope of those available under the GTLA, alleging entitlement pursuant to the Michigan No-Fault Act, MCL 500.3101, *et seq.* (the "No-Fault Act"). As set forth herein, MCL 691.1407 prohibits recovery beyond those allowed within the GTLA against a government tortfeasor.

The No-Fault Act was enacted in 1972, subsequent to the GTLA, to supplant traditional recovery via principles of common-law tort. *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). Michigan courts have recognized that governmental agencies are subject to the

No-Fault Act. *Trent v Suburban Mobility Authority for Regional Transportation*, 252 Mich App 247, 251; 651 NW2d 171 (2002). Recovery under the No-Fault Act is generally recognized under the two areas of "first-party" and "third-party" damages. First-party damages are for medical expenses, wage loss for an initial three years, and replacement services, arising out of a motor vehicle accident, without regard to negligence. MCL 500.3105. This Court has ruled that governmental agencies are subject to this provision, as the award of damages is without regard to negligence and therefore not confined by the limitations set forth within the GTLA. *Hardy v. Oakland County*, 461 Mich 561; 607 NW2d 718 (2000).

Third-party damages, as sought by Appellant, are for economic loss in excess of the initial three-year period including wage loss, replacement services, and noneconomic loss. MCL 500.3135(3)(b)-(c). Unlike first-party damages, third-party damages are recoverable only against a negligent tortfeasor. MCL 500.3135(3).

C. No-Fault Act Recovery Limited by GTLA

The GTLA is the exclusive means of recovery for tort liability against a government tortfeasor, which this Court has interpreted to include all civil wrongs for which a governmental agency may be liable for compensatory damages (with the exception of breach of contract actions, which are not at issue in the instant case.) *In re Bradley Estate*, 494 Mich 367, 371; 835 NW2d 545 (2013). In the instant case, the Court of Appeals correctly ruled that the recoverable damages set forth within the No-Fault Act third-party scheme are wider than recoverable damages available under the motor vehicle exception to the GTLA, and that those inconsistent with the GTLA were therefore unavailable against a government tortfeasor.

STANDARD OF REVIEW

This appeal follows the denial of a motion for summary disposition on governmental immunity grounds. The standard of review is de novo.

> We review de novo a trial court's determination regarding a motion for summary disposition. Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are "'barred because of immunity granted by law . . . .'" [12] The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with "affidavits, depositions, admissions, or other documentary evidence," the substance of which would be admissible at trial. [13] "The contents of the complaint are accepted as true unless contradicted" by the evidence provided. [14] *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008). (Footnotes omitted).

ARGUMENT

I. DO PAIN AND SUFFERING AND/OR EMOTIONAL DISTRESS DAMAGES QUALIFY AS A "BODILY INJURY" THAT PERMITS A PLAINTIFF TO RECOVER UNDER THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY?

Appellant's argument rests on a radical interpretation of common law governmental immunity and its evolution into the GTLA. The foundation of Appellant's position is that the *Ross v. Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984) court incorrectly held that governmental immunity should be construed broadly. Appellant claims that government immunity should *in fact* be narrowly construed and its exceptions broadly construed.

The manner in which Appellant comes about this conclusion, while creative, is neither accurate nor pithy. The City finds little merit in Appellant's attempt to resurrect the *long decomposed corpse* of the proper application of the GTLA. Indeed, the fact that Appellant's argument rests upon such a momentous and shaky foundation, calls into question the soundness of his entire argument. The City, unlike Appellant, simply attempts to defend its position in the *current case*. It has no grandiose design to overrule the well-reasoned, unassailable, and basic fundamentals set forth in *Ross* and its progeny.

Nonetheless, the City recognizes it has an obligation for purposes of appellate review to address Appellant's arguments. So the City will attempt to do the impossible and emulate Justice Eugene Black's inimitable pithy style, and briefly address Appellant's fifteen page attempt to overturn the long-established precedent reiterated by *Ross* as well as his ten page historical

overview of the interpretation of "bodily injury." After the history of said arguments has been properly respected and laid to rest, the City will address the issues of the living.

A. Governmental Immunity has always been Broadly Construed in Michigan.

Based upon a plain reading of the GTLA, it is clear the legislature wisely intended to afford the government a broad grant of immunity, while still offering plaintiffs relief from tort claims through a few narrow exceptions. This interpretation is reinforced by decades of case law, stemming from *Ross* in which this Court attempted to clarify the meaning of the GTLA. Contrary to Appellant's argument, the well-established legal precedent that governmental immunity shall be broadly construed, and exceptions narrowly construed, is well supported within *Ross*.

Any attempt to better explain the history of governmental immunity in Michigan in this brief would fall embarrassingly short of the Court's opinion. However, a brief summary of the history and rationale from *Ross* will aid in understanding how the Court reached its interpretation of the GTLA. The *Ross* Court was clear about their intent, stating that:

> In resolving the questions presented by this act, our goal has been to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability. We recognize that our case law on these questions is confused, often irreconcilable, and of little guidance to the bench and bar. We have made great efforts to reexamine our prior collective and individual views on this subject in order to formulate an approach which is faithful to the statutory language and legislative intent. Wherever possible and necessary, we have reaffirmed our prior decisions. The consensus which our efforts produce today should not be viewed as this Court's individual or collective determinations of what would be most fair or just or the best public policy. The consensus does reflect, however, what we believe the Legislature intended the law to be in this area. *Id.* at 596.

The *Ross* decision also discussed the government's liability prior to enactment of the GTLA. Specifically it shows that prior to the enactment of the GTLA the government had little to no liability for actual economic or physical damages, let alone emotional damages. *Ross* also

explains that historically the State of Michigan was immune from tort liability unless it legislatively allowed itself to be sued. However, an important distinction must be made; there was both an immunity from suit *and* an immunity from liability. Relevant portions follow:

> "[f]rom statehood forward, Michigan *jurisprudence recognized that the sovereign (the state) was immune from all suits, including suits for tortious injuries which it had caused.* The rationale for sovereign immunity was never grounded in a belief that the state could do no wrong. Rather, sovereign immunity existed in Michigan because *the state, as creator of the courts, was not subject to them or their jurisdiction.*" As the Supreme Court stated in *Michigan State Bank v Hastings*, 1 Doug 225, 236 (Mich, 1844): "The principle is well settled that, while a state may sue, *it cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction.* * * * [An] act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary. *Thus, the original Michigan rule held that the state was immune from all suits except to the extent that it consented to be sued in its courts. Id. at 598. (Emphasis added).*

Thus, as described by the Court in *Ross*, the original concept of immunity was grounded in the notion that courts had *no jurisdiction* to hear cases brought against the State. This meant that for all intents and purposes the State was entirely "immune from suit." *Ross* also explains that the Legislature subsequently took action to address this issue. For instance, in 1842 the Legislature created the Board of State Auditors to deal with claims against the State. Likewise, in 1939 the Legislature also created the Court of Claims to hear these types of cases. As a result, plaintiffs were able to bring their claims against the government in courts of competent jurisdiction.

However, although the government had created the Court of Claims to hear claims against the government, plaintiffs still had to overcome the common law edict that governments were immune when performing a *governmental function.* Essentially, while the claims might be heard, the government was still "immune from liability." This was because the Legislature statutorily

retained sovereign immunity from tort liability in § 24 of the Court of Claims Act: "This act shall in no manner be construed as enlarging the present liabilities of the state and any of its departments, commissions, boards, institutions, arms or agencies."

So, *Ross* clearly shows that prior to the GTLA, many of today's plaintiffs would not have had a cause of action, because the government would be immune. For example, *Ross* cites *Manion v State Highway Comm'r,* 303 Mich 1, 19-21; 5 NW2d 527 (1942). Manion sued for injuries received while employed by the State Highway Commission. The Court dismissed the case, finding that plaintiff was injured during the maintenance of a highway, which was a governmental function. Interestingly enough the analysis as to governmental immunity under common law did not even analyze the meaning of "bodily injury." Instead, the analysis centered on whether or not the action was "a governmental function." Simply put, if the action taken was a governmental function, the government was not liable.

Furthermore, *Ross* goes on to explain that in the early 1940's the Legislature enacted the first exceptions to governmental immunity. One instance was opening up government to liability for negligent acts by its employees. Interestingly enough, the government vehicle exception was among these negligent acts. 1945 PA 87 provided:

> AN ACT to abolish the defense of governmental function in certain actions brought against the state of Michigan; and to repeal section 24 of Act No. 135 of the Public Acts of 1939, as amended by Act No. 237 of the Public Acts of 1943.
>
> Section 1. In all actions brought in the court of claims against the *state of Michigan to recover damages* resulting from the negligent operation by an officer, agent or employee of the state of Michigan of a motor vehicle of which the state of Michigan is owner as defined by Act No. 302 of the Public Acts of 1915, as amended, *the fact that the state of Michigan was in the ownership or operation of such motor vehicle, engaged in a governmental function, shall not be a defense to such action:* Provided, however, That this

act shall not be construed to impose upon other owners of motor vehicles by the provisions of Act No. 302 of the Public Acts of 1915, as amended.

The Court in *Williams v City of Detroit*, 364 Mich 231; 111 NW2d 1 (1961) prospectively abolished governmental immunity for *municipalities*. In *Williams*, the decedent was killed in a municipal building. The trial court dismissed finding that the city was immune since it was engaged in a government function. The Appellate Court upheld the trial court's decision, but prospectively reversed the common law rule of municipal immunity when performing a governmental function.

However, the Court held that it did not have authority to abrogate state immunity; hence, the state remained immune if performing a governmental function. The Legislature reacted by enacting the GTLA in 1964 to reestablish governmental immunity for municipalities as it existed prior to *Williams*, and to create uniformity amongst similarly situated government actors.

What is noteworthy about this historical analysis is that prior to the exceptions created by the GTLA, the Legislature and the courts *readily* dismissed plaintiffs legitimate tort claims if the government was performing a government function. This is the *broadest* form of immunity. Contrary to Appellant's claim, common law immunity for municipalities (like the state) was *broad* prior to the rogue opinion in *Williams*. *Williams* clearly did not reflect the Legislature's intent considering that it created the GTLA three years later in response to it.

Ultimately, what is clear is that the end result of these historical developments in the area of governmental tort liability was establishment of the GTLA as interpreted by *Ross*. *Ross* demonstrates how the Court was clarifying and reiterating the fundamental precept of the GTLA. This precept is that the government has a broad grant of immunity from tort liability, limited to the narrow exceptions as established by the GTLA.

Finally, it is of significant importance to note that numerous courts have agreed with the *Ross* Court and its rationale. In fact, Appellant acknowledges the vast corpus of law following the decision in *Ross*, and admits this is the common understanding of GTLA. PL Brief at 14. Indeed, Appellant cites numerous cases which support the broad grant of immunity subject to narrow exceptions. [2]

Yet, Plaintiff does not go far enough in recognizing the ubiquitous nature of the corpus of law embracing this interpretation of the GTLA. In fact, there are additional cases beyond those cited by Plaintiff to support the common interpretation of the GTLA. *See, Jamieson v. Luce-Mackinac-Alger-Schoolcraft Dist. Health Dep't*, 198 Mich App 103, 107-8; 497 NW2d 551 (1993); *Haberl v Rose*, 225 Mich App 254, 257-8; 570 NW2d 664 (1997); *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998); *Suttles v State*, 457 Mich 635, 641; 678 NW2d 295 (1998); *Robinson v City of Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000); *Roby v City of Mt Clemens*, 274 Mich App 26, 29; 731 NW2d 494 (2007); *Flickinger v Van Buren County Rd Comm'n*, 2010 Mich App LEXIS 230 (2010).

Thus, it is striking how, notwithstanding the historical record and clear precedent to the contrary, Appellant presents such a novel interpretation of *Ross*. In essence, Appellant's foundational argument is to urge this Court to determine that *Ross* and all the subsequent cases following it are wrong. Appellant would have this Court now find that the GTLA provides merely a narrow grant of immunity to the government, rather than the broad grant intended by the

[2] *See, Maskery v. Bd of Regents, Univ of Mich*, 468 Mich 609, 614; 664 NW2d 165 (2003); *Stanton v. City of Battle Creek*, 466 Mich 611, 617-618; 647 NW2d 5-8 (2002); *Pohutski v. City of Allen Park*, 465 Mich 675, 689; 641 NW2d 219 (2002); *Haliw v. City of Sterling Heights*, 464 Mich 297, 303; 627 NW2d 581 (2001); *Nawrocki v. Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2002); *Horace v. City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); *DeSanchez v State*, 455 Mich 83, 90; 565 NW2d 358 (1997). PL Brief at 14-15.

Legislature. Appellant's tenuous argument is an attack on decades of measured jurisprudence, meant to turn the case law interpreting the GTLA on its head which should not be accepted.

Primarily this Court must be moved by the doctrine of *stare decisis* to reaffirm this vast body of law. However, it is also worth considering the implications of overturning the broad-narrow interpretation of the GTLA. First, citizens affected by ordinary governmental negligence will file numerous claims that will place an unfathomably vast caseload on the judiciary. Furthermore, the government, as a defendant, will also face an ever increasing burden of litigation. Second, the increased number of cases to which the government will be a party will cause economic turmoil, especially in distressed municipalities such as the City of Flint. The resources necessary to deal with this burden are simply unavailable to the government. In fact, it is not hyperbole to suggest such a massive change in this state's jurisprudence may cause some municipalities to enter bankruptcy proceedings.

B. The Court's interpretation of "bodily injury" in W*esche* properly reflected the legislative intent behind the GTLA.

Appellant's position seems to be that the *Wesche* definition of bodily injury and its progeny's interpretation of such is wrong because *historically* "bodily injury" included emotional and mental injuries. Appellant's position falls flat because the case law Appellant cites in support of his position does not involve governmental immunity. Hence, they are based on a historical interpretation of *general negligence* principals, not the issue at hand—governmental immunity.

Appellant cites *Sherwood v Chicago & WM R Co,* 82 Mich 374; 46 NW 773 (1890) for the proposition that prior to the enactment of the GTLA the common law term "bodily injury" encompassed mental injuries. The City acknowledges that the case law cited allowed mental injuries. However, regardless of how ripe this low hanging fruit may be, the center is clearly rotten.

Once one makes a simple cut into this argument, the truth emerges. *Sherwood* involves a case of *general negligence*. It has nothing to do with governmental immunity. Furthermore, *Sherwood* does not even use the term "bodily injury." Appellant criticizes the Court of Appeals for citing to MCL 600.6301 which "neither defines 'bodily injury' nor even uses the term; nor is it part of the GTLA or even in part material with the GTLA." PL Brief at 27 n 12. Ironically, this is exactly what Appellant does in citing to *Sherwood*.

Similarly, Appellant's use of *Phillips v Butterball Farms Co, Inc* (After Second Remand), 448 Mich 239, 249-252; 531 NW2d 144 (1995) is misplaced. As with *Sherwood*, the term "bodily injury" was not used or defined by the Court and *Butterball* is not a governmental immunity case. Phillips was an at-will employee. She claimed that Butterball wrongfully discharged her in retaliation for her attempt to enforce her rights under the worker's compensation act. Butterball argued that she was not entitled to any emotional damages because she was an at-will employee with no reasonable expectation in employment, and because her cause of action sounded in contract. The Michigan Supreme Court disagreed holding that her cause of action sounded in tort; and thus, she was entitled to all the damages that are offered under general tort principals. *Butterball* has nothing to do with the detailed analysis that the court must engage in today; general tort principals have no effect on the interpretation of "bodily injury" in the context of the GTLA and the No-Fault Act.

It is evident from this analysis that Appellant offers no support for his grand sweeping statement that "[w]hen, in 1964, the Legislature enacted the Governmental Tort Liability Act, 'bodily injury' damages had long acquired a settled meaning in the law as including mental and emotional distress damages flowing from physical injury." PL Brief at 27. The City's analysis of the actual history of the evolution of the governmental immunity sheds light on why Appellant

resorts to use of general negligence cases in support of his proposition. *See, supra* Section A. Prior to enactment of the GTLA the case law showed a broadly construed grant of immunity to essentially make the government immune from suit. As stated, the Legislature acted swiftly to reverse when the *Williams* court attempted to abolish municipal tort liability. There is simply no support in the case law for Appellant's position.

C. The Wesche Court's interpretation of bodily injury correctly held that nonphysical injuries were not allowed under the motor vehicle exception.

The *Wesche* Court was quite clear in defining the term "bodily injury" as "physical or corporeal injury to the body." This Court stated that:

> Although the GTLA does not define "bodily injury," the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate. *Horace v City of Pontiac,* 456 Mich 744, 756; 575 NW2d 762 (1998). The word "bodily" means "of or pertaining to the body" or "corporeal or material, as contrasted with spiritual or mental." *Random House Webster's College Dictionary* (2000). The word "injury" refers to "harm or damage done or sustained, [especially] bodily harm." *Id.* Thus, "bodily injury" simply means a physical or corporeal injury to the body. It is beyond dispute that a loss of consortium is not a physical injury to a body. "A claim for loss of consortium is simply one for loss of society and companionship. *Eide v Kelsey-Hayes Co,* 431 Mich 26, 29; 427 NW2d 488 (1988). Thus, because loss of consortium is a nonphysical injury, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity. *Wesche* at 84-85.

Appellant criticizes this Court's analysis of bodily injury in *Wesche* on several grounds. Unfortunately, Appellant's argument must fail because it is premised on a set of flawed assertions. First, for the reason addressed in Section A of this Brief, there is no merit to Appellant's position that the *Wesche* definition is "predicated in large part on the erroneous premise that every aspect of MCL 691.1405 was to be given an artificially narrow construction." PL Brief at 26. Second,

there is no merit to Appellant's argument that the Court's use of the lay dictionary was improper. It is important to recall that *Wesche* is not before this Court on review. Appellant is correct that the court in *Hunter* relied upon the *Wesche* definition of bodily injury which in fact used a lay dictionary. However, *Hunter* also completed *its own* analysis based on the use of Black's Legal Dictionary and came to the same conclusion as the court in *Wesche.* The *Hunter* Court held as follows:

> In considering the meaning of an undefined term of art it is also appropriate to consult a legal dictionary for guidance and to consider its meaning as developed at common law. *People v Flick*, 487 Mich 1, 11; 790 NW2d 295, 301 (2010). As the Court recognized in *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 56; 760 NW2d 811 (2008), "Black's Law Dictionary (7th ed), p 789 . . . defines 'bodily injury' as '[p]hysical damage to a person's body.'" See also Black's Law Dictionary (9th ed), p 856. In contrast, Black's defines "personal injury" to include "mental suffering," which is also in keeping with our case law. *Id.* at 857. As set forth in *Alfieri v Bertorelli*, 295 Mich App 189, 198; 813 NW2d 772 (2012), "the modern definition of a 'personal injury' [refers] to any invasion of a personal right, not only bodily injuries." Black's Law Dictionary (9th ed). Further, "[i]n the tort context, an 'injury' is generally understood to mean '[a]ny wrong or damage done to another, either in his person, rights, reputation, or property.'" Black's Law Dictionary (6th ed), p 785. *Karpinski v. St. John Hosp.-Macomb Ctr. Corp.*, 238 Mich. App. 539, 543; 606 N.W.2d 45 (1999). *Hunter* at 239-240.

For these reasons, there is no merit to Appellant's position. Incidentally, Appellant also argues the definition reached in *Wesche* should be ignored because he claims it is mere dicta. Appellant claims this because this Court could have held that the loss of consortium claim was an independent cause of action. Appellant's position is essentially that this Court went on a legal frolic and detour when it defined bodily injury in *Wesche*. To the contrary, this analysis was not dicta; this Court engaged in this analysis for a reason. *Wesche* was decided one year after the seminal case on governmental notice and tolling provisions—*Rowland, supra.* Although a highway exception case, the *Rowland* Court analyzed the notice provisions based on an historical

overview of notice requirements in provisions including the Motor Vehicle Accident Claims Act (MVACA), MCL 257.1118. Id at 207-208. *Rowland's* in depth analysis of the history of notice statutes overruled thirty-five years of precedent whereby the Courts required a prejudice requirement. This Court rejected the judicially-constructed prejudice requirement in exchange for a strict constructionist view of the statute. This Court later applied the *Rowland* holding to all notice statutes and tolling statutes. [3] This same logic is transferable to the instant statute. The Court of Appeals in *Hunter* no doubt applied this strict constructionist rationale as well. Relevant portions of Hunter follow:

> The holding in *Wesche* also comports with case law and our rules of statutory construction. Indeed, *our jurisprudence interpreting and applying the GTLA instructs that no expansive reading of the motor vehicle exception is appropriate or permitted.* The immunity from tort liability provided by the governmental immunity act is expressed in the broadest possible language; it extends to all governmental agencies and applies to all tort liability when governmental agencies are engaged in the exercise or discharge of governmental functions. *Id.* at 237.

Hence, the *Wesche* Court no doubt analyzed each word within the motor vehicle exception to determine the narrow construction of the term, since this was the norm subsequent to *Rowland.*

D. The conclusion that Appellant cannot recover pain and suffering, shock and other emotional distress damages under the motor vehicle exception is also supported by comparing the language of the current motor vehicle exception to the highway exception and the language of the 1945 motor vehicle exception.

[3] *McCahan v Brennan*, 492 Mich 730, 732; *822 NW2d 747* (2012)
We reiterate the core holding of *Rowland* that such statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate. We further clarify that *Rowland* applies to all such statutory notice or filing provisions, including the one at issue in this case.

Comparing the language of the motor vehicle exception to other exceptions in the GTLA is instructive in this area. The current motor vehicle exception states that the government shall only "be liable for bodily injury and property damage." MCL 691.1405. Alternatively, the highway exception provides that a "person who sustains bodily injury or damage to his or her property by reason of failure... to keep a highway... in reasonable repair... may recover the damages suffered by him or her from the governmental agency." MCL 691.1402. Thus, unlike the motor vehicle exception, the highway exception does not limit the types of damages that are recoverable. Instead, it allows the injured party to recover "the damages suffered by him."

Further, it should be pointed out that the 1945 version of the motor vehicle exception provide that State of Michigan was responsible for "damages." 1945 PA 87 stated in relevant parts as follows:

> AN ACT to abolish the defense of governmental function in certain actions brought against the state of Michigan; and to repeal section 24 of Act No. 135 of the Public Acts of 1939, as amended by Act No. 237 of the Public Acts of 1943.
>
> Section 1. In all actions brought in the court of claims against the *state of Michigan to recover damages* resulting from the negligent operation by an officer, agent or employee of the state of Michigan *of a motor vehicle* of which the *state of Michigan is owner* as defined by Act No. 302 of the Public Acts of 1915, as amended, *the fact that the state of Michigan was in the ownership or operation of such motor vehicle, engaged in a governmental function, shall not be a defense to such action. (emphasis added).*

Both the highway exception and the 1945 motor vehicle exception are in clear contrast with the current motor vehicle exception. The Legislature used varying language in describing the type of damages recoverable in these statutes, i.e. "bodily damage" on one hand and "the damages suffered by him" or "damages" on the other. This is strong evidence that the Legislature intended

that Plaintiff cannot recover non-economic damages from the City under the current motor vehicle exception of the GTLA.

E. The Court of Appeals correctly held that *Allen* does not support Appellant's claim for emotional damages.

The Court of appeals was clear that *Allen v Bloomfield Hills Sch. Dist.*, 281 Mich App 49; 760 NW2d 811, (2008) does not support Appellant's claim for non-economic damages. The Court of Appeals Order states as follows:

> However, plaintiff's reliance on *Allen* to support his claimed damages is misplaced. In *Allen*, the Court considered whether the plaintiff suffered a brain injury in the vehicle accident and whether the brain injury constituted a "bodily injury" under MCL 691.1405. *Allen*, 281 Mich App at 50-51. Here, while plaintiff presented evidence that he sustained a "bodily injury" to his back, his claim for emotional injuries is not one for which he may recover for the reasons set forth in *Wesche*. Unlike in *Allen*, here, there is no evidence that plaintiff had an objectively manifested brain injury that might have caused his claimed emotional injuries. *Id.* at 59-60.

In *Allen* the plaintiff was driving a train when a school bus tried to cross the tracks. The train was unable to stop and crashed into the school bus. The plaintiff did not hit his head, but suffered severe symptoms of post-traumatic stress disorder (PTSD) after the accident. The defendant argued that PTSD was not a physical injury and simply a form of emotional injury. However, the Court held that the positron emission tomography (PET) scans that plaintiff presented were sufficient to show an actual objective change in the brain. Relevant portions of the opinion follow:

> Plaintiff argues that he suffered a "bodily injury" because the accident caused *physical damage* to his body *as evidenced by a positron emission tomography (PET) scan of his brain.* He relies on the affidavit of Dr. Joseph C. Wu, who reviewed plaintiff's PET scan and opined that it depicted "decreases in frontal and subcortical activity consistent with depression and

> post-traumatic stress disorder." Dr. Wu further opined that "the abnormalities in Mr. Allen's brain as depicted on the September 8, 2006, PET scan are quite pronounced and are clearly different in brain pattern from any of the normal controls. They are also consistent with an injury to Mr. Allen's brain." Dr. Wu related the abnormalities to the January 13, 2004, accident. Plaintiff also relies on the report of Dr. Gerald A. Shiener, who opined that PTSD "causes significant changes in brain chemistry, brain function, and brain structure...Here, plaintiff presented *objective medical evidence* that a mental or emotional trauma can indeed result in *physical changes to the brain.*" *Id.* at 56-57.

Allen is easily distinguishable from the instant set of facts. In *Allen* plaintiff presented objective evidence (PET scan) of a *change in his brain* that was caused by the *emotional injury (PTSD)*. Hence, *Allen* compensated for a physical injury—the change in the brain—not the emotional injury. This has nothing to do with the instant case. Appellant argues the opposite, he claims that his physical injury (back injury) resulted in emotional damages. Appellant's No-Fault carrier already compensated him for the *physical injury* to his back. The emotional injury is not compensable as it did not result in a physical injury as in *Allen*. Thus, *Allen* is completely inapplicable to the current discussion.

F. Lost wages and medical expenses are recoverable under the motor vehicle exception because these are not separate and distinct from the bodily injury.

The Court held in *Hannay v DOT*, 299 Mich App 261, 269-270; *829 NW2d 883* (2013) that a plaintiff could recover No Fault allowable expenses, work loss, and survivor's loss beyond the three year limitation. The court held that the *Wesche* definition of "bodily injury" encompassed these economic expenses. Relevant portions of the opinion follow.

> Plaintiff relies on, and defendant seeks to distinguish, this Court's recent decision in *Jago v Dep't of State Police*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2011 (Docket No. 297880). Jago was a wrongful-death action premised on an automobile accident caused by an employee of the defendant. At issue was the plaintiff's recovery of survivor's loss damages. Id. Like defendant

> in this case, the defendant in *Jago* argued that, under the *Wesche* definition of bodily injury, survivor's loss benefits were not recoverable under the GTLA because the GTLA permits only recovery for bodily injury or property damage. This Court disagreed and held that survivor's loss benefits are damages for the bodily injury suffered by the person who died in the motor vehicle accident. Thus, this Court concluded that survivor's loss damages are an item of damages for the bodily injury suffered by the deceased injured person, and the waiver of immunity in the motor vehicle exception applies to claims for excess survivor's loss benefits. *Id.* at 269-270.
>
> Similarly, in this case, work-loss and loss-of-services damages are items of damages that arise from the bodily injuries suffered by plaintiff. However, to hold otherwise would conflate the actual-bodily-injury requirement for maintaining a motor vehicle cause of action against a governmental entity with the types of damages recoverable as a result of the bodily injury. To the contrary, we hold that the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. Accordingly, work-loss benefits and benefits for ordinary and necessary services that exceed the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3) are awardable against governmental entities, and the trial court did not err by awarding those economic damages to plaintiff in this case. *Id.* at 270.

This interpretation makes sense given the purpose behind the broad construction of governmental immunity. The significance of *Wesche* and its progeny *Hunter, Hannay* and *Jago* is that, plaintiffs cannot collect hugely speculative pain and suffering awards from the government once they meet the threshold. This line of cases makes clear that while the Legislature intended for government tortfeasors to be liable for work loss and other negative effects of its negligent acts, it did not intend for governments to be saddled with massive pain and suffering awards. This makes sense when one considers it. For example, consider the situation in which a person is seriously and permanently injured by a government vehicle. The economic expenses such as medical expenses would be covered by no fault insurer as well as the wage loss and allowable

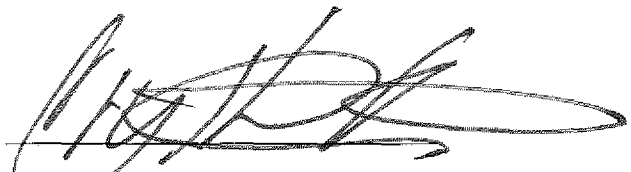
expenses for three years. After the three years, the government would be liable for the injured person's wage loss, plus replacement services and other allowable expenses. However, that person would not be entitled to pain and suffering associated with the injury.

The legislature waived immunity so the injured person would be taken care of in a serious injury situation, but it also intended to protect the *citizens* from potentially ruinous speculative pain and suffering awards. The City of Flint is a not 1101 S. Saginaw Street or some certificate of municipal incorporation—it is the one hundred thousand citizens that live within the City and expect the people at 1101 to keep their street lights on. This is why the Legislature gives broad immunity to governments with *limited* exceptions. It is a delicate balance between protection of the injured person and protection of the people.

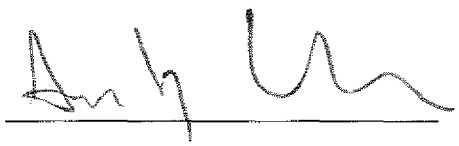
CONCLUSION

Based upon the forgoing, the Michigan Supreme Court should affirm the decision reached by the Michigan Court of Appeals, and find that non-economic damages do not fall within the definition of "bodily injury" for purposes of the motor vehicle exception of the GTLA.

Respectfully submitted,



Crystal Olmstead (P69202)



Anthony Chubb (P72608)